

No. 08-1448

**In the
Supreme Court of the United States**

ARNOLD SCHWARZENEGGER, *et al.*,
Petitioners,

v.

ENTERTAINMENT MERCHANTS ASSOCIATION,
et al.,
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

**BRIEF OF *AMICI CURIAE* INTERNATIONAL
GAME DEVELOPERS ASSOCIATION AND
ACADEMY OF INTERACTIVE ARTS AND
SCIENCES IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICI CURIAE*¹

The International Game Developers Association (“IGDA”) is a California nonprofit association serving 12,000 active members of the game industry. IGDA seeks to enhance the lives of game developers by connecting members with their peers; promoting professional development; publishing on technical, creative, and business matters of interest to the development community; and advocating on issues that affect the community. Based in Mt. Royal, New Jersey, IGDA has 34 local chapters in the United States and 80 worldwide.

The Academy of Interactive Arts & Sciences (“AIAS”) is a nonprofit organization based in Los Angeles, California, that promotes common interests in the worldwide interactive entertainment community, and enhances awareness of the interactive arts and sciences by conducting a televised annual awards show and cosponsoring an annual juried exhibition of original artwork created for video and computer games.² AIAS has more than 20,000 members located around the world, including

¹ Counsel for all parties have consented to the filing of *amicus* briefs, and their consents have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

² Into the Pixel, *An Exhibition of the Art of the Video Game*, at <http://www.intothepixel.com>.

programmers, engineers, artists, designers, animators, writers, composers, orchestrators, performers, quality-control personnel, students, educators, and representatives of major and independent videogame companies.

IGDA and AIAS file this brief to provide the Court foundational information about the expressive nature of today's complex videogames. *Amici* also set forth their concern that California's challenged statute, California Civil Code §§ 1746-1746.5 ("the Act"), will undermine their members' freedom of expression.

INTRODUCTION AND SUMMARY

Although the parties agree that videogames are constitutionally protected expression, the State of California nevertheless asks this Court to find that violent videogames "are simply not worthy of constitutional protection when sold to minors without parental participation."³ The State asks the Court to make this judgment while providing only a single example of a game it deems to be violent—and offering essentially no context regarding the expressive nature of games that could fall under the Act. Meanwhile, one of the State's *amici* supporters, seizing on the State's theme that games are valueless, asks the Court to declare that videogames are not protected expression at all.

It makes little sense, however, to consider the extent to which constitutional protections apply to an expressive medium absent familiarity with the medium itself. And because videogames are not yet

³ Pet. Br. 6.

as ubiquitous in mainstream culture as books or movies, this familiarity cannot be presumed. IGDA and AIAS accordingly submit this brief in part to provide background about videogames.

Part I explains that videogames represent an ever more important mode of artistic expression. Videogames represent the intersection of movies—a medium long protected by the First Amendment—and literature, with story lines more complex than the movie format permits, scripts performed by professional actors, cinema-quality graphics, and orchestral scores as lush and complex as any contemporary music. Both the public and the mainstream media increasingly evaluate games as works of art using the same standards applied to other forms of artistic expression.

But videogames differ from these other media in one important way: they are interactive. Of course, all literature is interactive in one sense—it succeeds when it “draws the reader into the story, makes him identify with the characters, invites him to judge and quarrel with them, to experience their joys and sufferings as the reader’s own.”⁴ But videogames are far more concretely interactive, which makes them particularly useful for persuading and informing—not to mention entertaining.

But to truly understand videogames—including violent ones—as a serious interactive art form, one must look closely at specific games, including their genesis and influences, the gameplay itself, and the

⁴ *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001).

issues and ideas that the games are intended to explore. Part II of this brief does just that, discussing in detail four videogames that IGDA and AIAS fear may be deemed “violent” under the Act.

Unfortunately, the term “fear” is *apropos* here, because it is not possible to *know* whether these four games would fall under the Act. Part III explains that the Act is too vague to allow game designers to determine what kinds of games could subject them to liability. As a result, the Act will force videogame authors and producers to self-censor—an outcome that clearly violates the First Amendment. Moreover, the risk of self-censorship is particularly acute here because the Act creates strict liability, thereby punishing entirely innocent violations of the vague statutory scheme.

ARGUMENT

I. VIDEOGAMES ARE AN IMPORTANT MEDIUM OF ARTISTIC EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

This Court has long recognized that the protections of the First Amendment extend not just to “political and ideological speech,” but also to a wide variety of art and literature that communicates ideas more indirectly.⁵ Thus, First Amendment protection applies not just to books or newspapers but also to “motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works.”⁶ As discussed below,

⁵ *Schad v. Mt. Ephraim*, 452 U.S. 61, 65 (1981).

⁶ *Id.*

videogames are both expressive and culturally important—the very characteristics that the Court found relevant in determining that these other forms of speech are protected.⁷

A. The Universe of Modern Videogames.

Early interactive games enabled users to play tic-tac-toe on a mainframe computer or a simple game of table tennis on a television screen. But modern games—and particularly the sorts of games at issue in this case—bear little resemblance to these rudimentary games of ages past. Modern videogames typically tell intricate stories using crisp graphics, custom musical scores, and scripts read by talented actors. As such, videogames are complex works of narrative performance art—just like movies, television shows, and theatrical drama.

To understand the universe of modern videogames, it helps to have in mind a number of basic categories—although categorization is necessarily imprecise because genres are constantly evolving. First, games are often categorized based on whether their storyline is “linear” or “nonlinear.” Linear games employ a storyline with a beginning, middle, and end, and the player cannot change the game’s basic trajectory. Nonlinear (sometimes called “sandbox” or “open-ended”) games present players with challenges that can be completed in many different ways and allow the player to explore an open-world environment extending beyond the game’s core objectives.

⁷ See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952).

Beyond that basic division, games may be divided into categories reflecting the style of gameplay:

- *Action games* often focus on combat, requiring quick reflexes and accuracy to overcome gameplay obstacles.
- *Action-adventure games* may require the player to overcome obstacles through combat or using a tool obtained through gameplay. These games require problem-solving skills and exploration as well as combat skills.
- *Adventure games* often do not require fast reflexes or combat, but instead require the player to solve puzzles by interacting with the environment.
- *Role-playing games* require the player to assume the role of a character, who is then maneuvered through the world of the game. Many such games are “massively multiplayer online games” (“MMOs”) that allow hundreds of different players to interact simultaneously online.
- *Simulation games* closely simulate reality or a fictional reality—for example city-building, pet-raising, or farming.
- *Strategy games* require careful thinking, often similar to the strategies of chess, Scrabble, Monopoly, or other board games.

Games may be further categorized by the *purposes* for which they are played. At one end of the spectrum are games that are primarily “serious,”—written to teach or to persuade, although they are naturally intended to be enjoyed as well. Like nonfiction literature, newspaper editorials, and documentary films, however, these games inform or

argue directly. At the other end of the spectrum are games written primarily to entertain—but often also having important expressive components. Indeed, as this Court wrote in *Winters v. New York*, “the line between the informing and the entertaining is too elusive” to serve as a distinguishing factor in First Amendment analysis.⁸

On the “serious” side are “teaching” games such as Justice O’Connor’s *Do I Have A Right?*, *Supreme Decision*, and *Argument Wars*, which introduce children to the judiciary. In these games, players “step into the shoes” of judges and lawyers to analyze legal issues and learn to think like a lawyer.⁹ Similarly, “persuasive games” like those of Georgia Institute of Technology professor Ian Bogost are specifically designed to persuade.¹⁰ For example, Bogost’s game *Food Import Folly*—which the *New York Times* recently published as an editorial on its website—argues that “limited resources and rapidly rising food import levels have reduced import inspections to an embarrassingly small number.”¹¹

Toward the other end of the balance between instruction and entertainment is the game *Nier*, a third-person adventure game in which you play a

⁸ 333 U.S. 507, 510 (1948).

⁹ Chris Baker, *Sandra Day O’Connor: Game Designer*, *Game Life*, 06/04/08, at <http://www.wired.com/gamelife/2008/06/justice-oconnor>.

¹⁰ See, e.g., Ian Bogost, *Persuasive Games: The Expressive Power of Videogames* (MIT Press 2007).

¹¹ *Mind Games: Food Import Folly*, *N.Y. Times*, 05/24/07, at http://select.nytimes.com/2007/05/24/opinion/20070524_FOL_LIES_GRAPHIC.html?_r=1.

devoted father searching for a cure for his daughter's terminal illness. Although *Nier* is designed primarily to entertain (and although it is also quite violent), it also communicates profound ideas, just as great literature does. The *New York Times's* videogame critic wrote that *Nier*—like other great games—is “mostly about contextualizing and speaking to various aspects of human existence, even violence, in the service of an entertaining, interactive artistic experience.”¹² Thus, *Nier* both entertains and poses philosophical questions: “Is humanity a state of being? A state of mind? A state of purpose?”¹³

Games from Manhattan-based developer Kuma War provide a further example of the indistinct line between entertainment and social or political commentary. Kuma War produces a variety of violent war games that encourage players to grapple with difficult political questions. For example, the game *Osama 1998* models what it would have been like to carry out the United States' failed 1998 plan to capture Osama bin Laden, allowing players to assess for themselves the merits of the plan.¹⁴ Another Kuma game, *Assault on Iran*, simulates an attack designed to destroy nuclear facilities in Iran, and prompted a response by Iranian students who were offended by the game's message. Their game,

¹² Seth Schiesel, *Wielding Swords in a World of Sharp Tongues*, N.Y. Times, 05/03/10, at <http://www.nytimes.com/2010/05/04/arts/television/04nier.html>.

¹³ *Id.*

¹⁴ Kuma Games, *Osama 1998*, at <http://www.kumawar.com/Osama/overview.php>.

Commander Bahman, simulates “a virtual counter-attack that will feature the rescue of an Iranian atomic scientist captured by U.S. forces in Iraq.”¹⁵ Kuma War, in turn, responded by creating a third game entitled *Assault on Iran, Pt.3: Payback in Iraq*, which picked up the plot where the Iranian students left off. These games thus represent a sort of virtual chain novel featuring arguments and responses of authors with opposing viewpoints.

In short, modern videogames comprise a highly diverse electronic art form with one common characteristic: from serious games to entertaining games, from adventure games to role-playing games, videogames tell stories. At first blush, those stories are neither more nor less entitled to First Amendment protection than stories from other media intended to entertain, inform, persuade, and teach.

B. The Cultural Significance of Games.

But to fully appreciate why videogames are entitled to First Amendment protection, it is not enough to simply catalogue the broad styles of videogame available on the market. It is equally important to appreciate the cultural significance of videogames as modern art, an issue we address here. As explained below, videogames have become a culturally significant medium of expression, a fact that is reflected in at least four ways.

¹⁵ Kuma LLC, *Kuma Reality Games Sparks Virtual Dialogue With Iran Over Nuclear Arms Dispute*, 06/09/06, at <http://www.kumawar.com/PressReleases/06-16-2006.php>.

First, videogames have become an important focus of critical commentary on the arts. Today, videogame reviews and criticism regularly appear in mainstream newspapers and academic literature—right alongside reviews of literature, movies, television, and theatre. For example, the *New York Times* regularly publishes its game reviews in the Arts section under the heading “Television.” The *Washington Post*, for its part, publishes reviews in the Weekend section with movie reviews. This positioning represents a cultural shift: ten years ago, videogame reviews appeared (if at all) with articles about technology or business—today, however, society increasingly views videogames as popular contemporary art.

The content of newspaper reviews further underscores this view, as videogame reviews typically probe a videogame’s value the same way they would probe any other work of art or literature. The *New York Times*’s review of the game *Hey Baby* is a good example. *Hey Baby* is a game that puts players in the shoes of an attractive woman who is the victim of sexual harassment. The game is a simple “revenge fantasy” in which the player can shoot men who utter coarse one-liners like “I wanna lick you all over” and “I like your bounce.” The *New York Times* critic initially found the game offensive but ultimately gave *Hey Baby* a positive review “not as a game but as a provocative, important work of interactive art as social commentary.” In short, the reviewer appreciated the game because, like a piece of literature, it is deeply affecting and communicates something important about the world:

The men cannot ever actually hurt you, but no matter what you do, they keep on coming, forever. The game never ends. I found myself throwing up my hands and thinking, ‘Well what am I supposed to do?’ Which is, of course, what countless women think every day.... I doubt any noninteractive art form could have given me as visceral an appreciation for what many women go through as part of their day-to-day lives.¹⁶

Second, videogames are an increasingly important creative inspiration for other media, including books and movies. For example, Jordan Mechner’s game series *Prince of Persia* gave rise to the movie *Prince of Persia: The Sands of Time*, produced by Jerry Bruckheimer (best known as producer of the *Pirates of the Caribbean* movies). The game *Hitman* inspired the 2007 film by the same title. The game *Resistance: Fall of Man* inspired William C. Dietz’s book *Resistance: The Gathering Storm*. The game series *Tomb Raider* inspired the films *Lara Croft: Tomb Raider* and *Tomb Raider: The Cradle of Life* and the novels *The Amulet of Power* by Mike Resnick, *The Lost Cult* by E. E. Knight, and *The Man of Bronze* by James Alan Gardner. At the same time, the divisions between these genres are blurring. Videogames are increasingly being “played” in movie theatres.¹⁷ And

¹⁶ Seth Schiesel, *A Woman With the Firepower to Silence Those Street Wolves*, N.Y. Times, 06/07/10, at <http://www.nytimes.com/2010/06/08/arts/television/08baby.html>.

¹⁷ Amplitude Inc., *B!G Screen Gaming*, at <http://www.bigscreengaming.com>; *Now, Only in Theaters*:

the music from games—which often consists of entire orchestral works composed specifically for the game—is frequently released for sale on audio CDs as a work apart from the game, sold online by digital download, and performed by major symphonies.¹⁸

Third, the cultural importance of videogames is reflected by the vast number of universities that now offer courses and even degrees in videogame design. For example, the University of Southern California’s School of Film and Television—which educated movie titans like George Lucas, Steven Spielberg, and Ron Howard, among others—has opened an Interactive Media Division, which offers a Bachelor of Arts degree in interactive entertainment, a Master of Fine Arts degree in interactive media, and a minor in videogame design and management.¹⁹ And prestigious art schools like the Rhode Island School of Design offer majors in Computer Animation, Design for Digital Media, and Game Design.²⁰ Similarly, the Pratt Institute offers a major in digital

New Playstation Games, N.Y. Times, 10/12/09, at <http://gadgetwise.blogs.nytimes.com/2009/10/12/now-only-in-theaters-new-playstation-games>.

¹⁸ Benjamin Frisch, *At the Concert Hall, a Symphony for Space Invaders*, NPR, 08/05/07, at <http://www.npr.org/templates/story/story.php?storyId=12478692&ps=rs>.

¹⁹ USC, *School of Cinematic Arts*, at <http://cinema.usc.edu/programs/interactive/about.htm>.

²⁰ RISD, *Curriculum*, at http://www.risd.edu/precoll_courses.cfm#majors.

arts and the Savannah School of Art & Design offers an interactive-design-and-development program.²¹

One reason for the growing popularity of videogame studies in universities is that creating a videogame is a complex undertaking that requires both technical skills and artistic ability. As the International Center for the History of Electronic Games explains, “In the beginning, when computers were less powerful, passionate individuals could create simple electronic games. Today, most electronic games involve teams of programmers, designers, project managers, artists, and testers, often working with budgets of millions of dollars.”²² But technical complexity alone cannot account for the wide array of videogame studies programs. Colleges and universities simply would not teach videogame studies if not for the vast number of

²¹ Pratt Institute, *Digital Arts B.F.A.*, at http://www.pratt.edu/academics/degrees/undergraduate/digital_arts_bfa/; see also SCAD, *Interactive Design and Game Development*, at <http://www.scad.edu/interactive-design-and-game-development/index.cfm>; Dartmouth College, *Film & Media Studies*, at <http://www.dartmouth.edu/~film>; Globe University Minnesota School of Business, *Game & Application Development*, at <http://www.msbcollge.edu/degree-programs/it/programming-and-game-development>; Brown University, *Modern Culture & Media*, at <http://www.brown.edu/Departments/MCM>; Rochester Institute of Technology, *Interactive Games and Media*, at <http://igm.rit.edu>.

²² International Center for the History of Electronic Games, *Concentric Circles: A Lens for Exploring the History of Electronic Games* (2010), at <http://www.icheg.org/files/ConcentricCircles.pdf>.

students eager to enter the field, the high-level creative and technical skill required for participation, the growing demand for talent in the videogame-development field, and the important role of videogames in modern culture.

Finally, the importance of games is reflected by increasing scholarly interest in the relationship between games and culture. So, for example, the Strong Museum of Play features exhibits on videogames as a mirror of human play, which is “critical to learning and human development and offers a unique window into American culture.”²³ The museum views videogames as both an “art” and a “science,” the study of which is important because videogames “captured the American imagination and launched a powerful and continuing force in American culture.”²⁴ There is, moreover, a growing body of academic videogame criticism.²⁵

²³ Strong National Museum of Play, *at* http://www.museumofplay.org/about_us/index.html.

²⁴ Strong National Museum of Play, *Videotopia*, *at* http://www.museumofplay.org/things_to_see/videotopia.html.

²⁵ *E.g.*, *Unit Operations: An Approach to Videogame Criticism* (“A book about comparative videogame criticism: games, philosophy, literature, and art.”) *at* http://www.bogost.com/books/unit_operations.shtml.

II. ANALYSIS OF INDIVIDUAL VIDEOGAMES ILLUSTRATES THAT GAMES, LIKE LITERATURE AND FILM, ARE A SERIOUS MEDIUM OF EXPRESSION EXPLORING COMPLEX MORAL AND SOCIAL ISSUES.

Part I of this brief discusses the videogame industry generally, arguing that today's games are a complex expressive medium. To really appreciate that point, however, it is necessary to look more closely at specific games. In this section, we examine four games rated "M" or "mature" for violence. Up close, it is clear that the games are not merely violent for the sake of violence. Rather, as in much of today's cinema, television, and literature, the violence is but one integrated part of a complex story.

A. Red Dead Redemption.

Red Dead Redemption, published by Rockstar Games, is the top-selling videogame for 2010 through August. With development costs of \$80-100 million, the game's budget is comparable to that of the largest Hollywood movies.²⁶ The game is rated "M" for "mature" by the Entertainment Software Rating Board ("ESRB"), the recognized ratings body of the videogame industry.

Red Dead Redemption is an "open-world" action-adventure game in which the player assumes the

²⁶ Seth Schiesel, *Way Down Deep in the Wild, Wild West*, N.Y. Times, 05/16/10, at http://www.nytimes.com/2010/05/17/arts/television/17dead.html?_r=1.

role of John Marston, a reformed criminal forced by the United States government to track down the remnants of his old outlaw gang. As noted above, “open-world” or “sandbox” games allow players to roam freely around a virtual world. The virtual world of *Red Dead Redemption* is the American West in the years leading up to World War I—a world physically straddling the border between the United States and Mexico and metaphorically straddling the cultures of the Old West and modern American society.

While gameplay in *Red Dead Redemption* is driven by the basic storyline of Marston’s mission, it does not follow any linear path. Instead, the player is allowed to roam through Wild West towns and countrysides, interacting with a vast array of supporting characters. Those interactions may be as casual as an exchange of greetings or far more extensive: for example, Marston is free to accept or reject missions from characters on either side of the law, from herding cattle and breaking mustangs, to capturing local bandits, to racing wagons, and so on. Or, on his own, Marston (really the player, of course) can decide to simply ride into the wild to take in the scenery, to hunt wild game, or to pick herbs and desert flowers; he may stop along the way to help the many folks beset by thieves, rustlers, and vagabonds—or for that matter, he may rob them himself.

Questions of ethics and morality are one of the many aspects of gameplay left to the player to decide. The game does not foreclose the option to play Marston as a nasty drunk who robs stagecoaches, assaults women, and refuses to intervene to stop violent crimes. Alternatively, Marston can help the

needy, employ good manners, and otherwise behave honorably. Either way, however, the player's choices have consequences: a meter on the screen tracks Marston's morality, together with a separate "fame" bar that measures his renown. A reputation for immorality will, for example, make shopkeepers—from whom Marston requires clothing, weapons, and other supplies—unlikely to welcome his business. Crimes committed within towns may also result in a bounty placed on Marston's head. The higher the bounty, the more likely he is to be hunted down and killed by bounty hunters—an undesirable outcome for the player.

Regardless of the moral choices a player makes, *Red Dead Redemption* is violent, at times even gory. ESRB states that games with an M rating "may contain intense violence, blood and gore, sexual content and/or strong language."²⁷ The ratings organization describes violence in *Red Dead Redemption's* as follows:

Players use shotguns, pistols, and rifles to kill enemies in realistic gun battles. Players can engage in melee-style hand-to-hand combat and trigger slow-motion effects by shooting enemies at close-range or by targeted shooting (i.e., aiming for body parts). Blood often spurts out of characters when shot; head shots and knife attacks result in much larger sprays. In one sequence, a bloodied and mutilated corpse can be seen hanging from the rafters of a barn. Players have the ability to shoot pedestrians in the game;

²⁷ ESRB, *Game Ratings & Descriptor Guide*, at http://www.esrb.org/ratings/ratings_guide.jsp.

however, a “Wanted Level”-penalty system discourages these acts by triggering a law enforcement response.²⁸

Fundamentally, however, this clinical description of violence in *Red Dead Redemption* has little more to do with what the game is “about” than would a similar description of Oedipus Rex, which of course features patricide, mutilation, and incest. In the words of one critic, *Red Dead Redemption* “hold[s] a mirror up to society and remind[s] us that present day hot button issues like racism, immigration, federal government powers and personal freedoms are not only nothing new, they are deeply ingrained in American society.”²⁹ Moreover, the game “generates much of its heft from clear engagement with concepts like the end of the American frontier and the shift from what could be called a historical America to a modern United States.”³⁰ The world of *Red Dead Redemption*, like our own, is “one in which good does not always prevail and yet altruism rarely goes unrewarded,” “a violent, unvarnished, cruel world of sexism and bigotry, yet one that abounds with individual acts of kindness and compassion,” and “a complex world of ethical range and subtlety.”³¹ In short, experiencing

²⁸ ESRB, *Red Dead Redemption*, at <http://www.esrb.org/ratings/synopsis.jsp?Certificate=28989>.

²⁹ Eric Brudvig, *Red Dead Redemption Review*, IGN, 05/17/10, at <http://xbox360.ign.com/articles/109/1090125p1.html>.

³⁰ Seth Schiesel, *The Best Virtual Worlds Have a Touch of Reality*, N.Y. Times, 08/06/10, at <http://www.nytimes.com/2010/08/07/arts/television/07games.html>.

³¹ Schiesel, *supra* note 26.

Red Dead Redemption, like experiencing any work of art, requires engaging with fundamental facets of human existence.

Significantly, *Red Dead Redemption*—like works in other media—overtly references many of its inspirations, inviting players to look beyond the game itself for further exploration of the issues that it raises. From the perspective of plot, “Sam Peckinpah’s [movie] *The Wild Bunch* is the most obvious influence, as you guide your character over the border to Mexico, rob a train, help a group of revolutionaries and mow down a horde of banditos . . .”³² But as the game’s art director observed in an interview, other films were also incorporated—for example, “the Australian Western *The Proposition*” was the source of the theme of “the brutal means by which a government will seek to extend its reach.”³³ And *Red Dead Redemption* includes visual and thematic nods to Don Siegel’s *The Shootist* (starring John Wayne), Clint Eastwood’s *High Plains Drifter* and *Unforgiven*, Simon Wincer’s *Lonesome Dove* (starring Robert Duvall), and other films.³⁴ Furthermore, “the influences for the story of *Red Dead Redemption* also extend beyond film, for example to the *Blood Meridian* books of Cormac McCarthy.”³⁵

³² Alastair Plumb, *Red Dead Redemption Goes To The Movies*, *Infinite Lives*, 05/19/10, at <http://www.empireonline.com/empireblogs/words-from-the-wise/post/p779>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

Significantly, the violence in *Red Dead Redemption* utterly pales compared to that of McCarthy's *Blood Meridian*, which also explores the last years of the Old West. Violence in *Blood Meridian* includes graphically rendered scenes of mass murder, scalping, rape, and indeed all manner of bloodshed, brutality and cruelty. Yet the book is widely regarded as McCarthy's masterpiece and one of the greatest American novels of the last century, ranked by the *New York Times* as runner-up in the most important works of American fiction in the last 25 years.³⁶ Notwithstanding the novel's disturbing nature, however, it may be purchased by minors in nearly any bookstore and has assuredly been read by thousands, perhaps millions, of minors around the world. Just as California could not—and presumably would not want to—pass a law banning the sale of *Blood Meridian* to minors in California, government intervention categorically denying the experience of *Red Dead Redemption* to minors makes no sense.

B. Assassin's Creed II.

Assassin's Creed II was released by Ubisoft Entertainment S.A. in November 2009. As its title suggests, *Assassin's Creed II* is a sequel, one of five games in the popular *Assassin's Creed* series so far, with a sixth expected in November 2010. *Assassin's*

³⁶ The New York Times, *What Is the Best Work of American Fiction of the Last 25 Years?*, N.Y. Times, 05/21/08, at <http://www.nytimes.com/2006/05/21/books/fiction-25-years.html>.

Creed II was rated “M” for “mature” by the Entertainment Software Rating Board.

Like *Red Dead Redemption*, *Assassin’s Creed II* is an “open-world” action-adventure game with non-linear gameplay. Most of the action takes place in late fifteenth-century Italy, including Venice, Florence, and the Tuscan countryside. The plots and sub-plots of the *Assassin’s Creed* games are too intricate to describe here, but the main plot revolves around a bartender named Desmond Miles, who is captured in 2012 by a large multinational corporation called Abstergo Industries. The game implies that 2012 is a time of chaos and destruction; during this strife, Abstergo seeks to locate artifacts called “Pieces of Eden” that will allow it to control individuals’ minds and achieve hegemony. Desmond Miles’s ancestors were Assassins who knew the location of the Pieces of Eden. Abstergo forces Miles to enter the fictional “Animus” machine, which decodes a subject’s DNA to reveal the memories of his ancestors. Throughout the *Assassin’s Creed* games, details emerge of a struggle (relating to control of the Pieces of Eden) between two factions—the Assassins and the Knights Templar.

Assassin’s Creed II specifically concerns Miles’s genetic memories of ancestral nobleman Ezio Auditore ad Firenze, who became an assassin after his father and brothers were murdered. Gameplay allows players to animate Ezio as he explores highly detailed cities and countrysides in fifteenth-century Italy. As in *Red Dead Redemption*, the player chooses among a wide variety of missions—about 200 in total, including eavesdropping, interrogation, pickpocketing, bodyguarding, and, of course,

assassination. Ezio also interacts with a wide variety of nonplayer characters (“NPCs”)—some are available for hire to serve as distractions or fight alongside the player; some may pay to have another NPC followed; others seek to take advantage of Ezio’s core competence as an assassin; and still others are other enemies, including Knights Templar. As in the earlier game *Assassin’s Creed*, NPCs are often based on historical figures, including Machiavelli, Caterina Sforza, Lorenzo de’ Medici, the Pazzi Family, Pope Alexander VI, and a young Leonardo da Vinci.

The *New York Times* describes *Assassin’s Creed II* as “an unparalleled historical adventure along the lines of an interactive Dan Brown or James Clavell novel, melding historically accurate locations, personages and events with pseudoplausible conspiracy theories rooted in antiquity.”³⁷ But while it is partly correct to say that *Assassin’s Creed II* plays like a novel, that description also sells the game short. It also plays like a movie and, perhaps more unexpectedly, it plays like a two-CD box set of haunting, evocative, and often touching music. Composer Jesper Kyd is among the most acclaimed videogame-score composers, and *Assassin’s Creed II* is arguably his masterpiece. Kyd recorded the score with a 30-piece orchestra and a 13-person choir, creating “a beautiful, sweeping soundtrack that’s just as epic as anything you’d hear in a contemporary cinematic epic scored by Hans Zimmer or James

³⁷ Seth Schiesel, *On the Scenic Trail of Intrigue: Adventures in 15th-Century Italy*, N.Y. Times, 12/07/09, at <http://www.nytimes.com/2009/12/08/arts/television/08assassin.html>.

Newton Howard.”³⁸ Although the “rich instrumentation and lush vocals” have a “modern-day musical aesthetic,” they “feel right at home in Renaissance Italy.”³⁹ And Ubisoft clearly knew the “slice of sonic genius they [had] on their hands, as they wasted no time releasing the expansive 35-track, 2-disc soundtrack.”⁴⁰

Significantly, however, the *Assassin’s Creed* universe extends far beyond the game itself—it has given rise to a variety of works in other media as well. *Assassin’s Creed: Renaissance* is a novelization written by Oliver Bowden, essentially chronicling the events of *Assassin’s Creed II* without the action sequences. Ubisoft also produced a series of three short films, together known as *Assassin’s Creed: Lineage*, that take place after *Assassin’s Creed* and provide a prequel to *Assassin’s Creed II*. As more related games are issued, works in other media are likely to continue to proliferate.

Whatever the artistic merits of *Assassin’s Creed II*, for purposes of this case it is important to note that the game, like *Red Dead Redemption*, is often violent and sometimes gory. ESRB can again be counted upon to provide a clinical recounting:

When blades connect, blood shoots out in a fountain-like manner as targets groan or scream. . . . [T]he player hears a distinctly

³⁸ Brian Linder, *Assassin’s Creed 2 Soundtrack Review*, IGN, 12/01/09, at <http://music.ign.com/articles/105/1050663p1.html>.

³⁹ *Id.*

⁴⁰ *Id.*

“wet” flesh-impact sound. The most graphic depictions of violence occur during cinematic cutscenes . . . A businessman, crawling away from a Templar leader, gets pinned to the ground by a sword through his neck; a young nobleman is ambushed by rivals, begs for mercy, then gets stabbed multiple times in the chest The spurts and sprays of blood that accompany some of the stabbing attacks can be intense.⁴¹

But, of course, ESRB does not get to the “why” of the violence in the game, only the “what.” As one “devout Christian” reviewer of the game wrote, however, the game actually “drives home the moral gravity of killing a human being”:

Each major assassination is followed up by a small cinematic in which the target dies in my [Ezio’s] arms. . . . In fact, it is that conflict that serves as the primary growth experience for Ezio. Rather than becoming more comfortable and hardened as the years go by, each kill brings its own surprises and regrets.⁴²

And ultimately, as the same reviewer writes, the game explores fundamental questions:

⁴¹ ESRB, *Assassin’s Creed 2*, at <http://www.esrb.org/ratings/synopsis.jsp?Certificate=27983>.

⁴² Richard Clark, *Assassin’s Creed II: Shot Through the Heart*, *Christ and Pop Culture*, 01/28/10, at <http://www.christandpopculture.com/featured/assassins-creed-2-shot-through-the-heart>.

[As a] . . . Christian . . . I cannot help but experience *Assassin's Creed 2* within the context of my own belief system. [But i]t is in fact the concept of a belief system itself which this game seems to hold up to scrutiny, particularly when the Assassin's Creed is revealed: "Nothing is true. Everything is permissible." This creed is in fact presented in direct opposition to the organized religion of the Catholic Church, the only real religious institution in place within the context of the game. . . . By the end of the game it becomes very clear that the true heroes aren't the ones who claim the truth, but are instead those who live in ambiguity and seek out freedom.⁴³

That is, of course, a message that the player—particularly a devout Christian—is free to reject, but as the reviewer concludes, "the writers of this game put their beliefs and convictions on the line . . . resulting in . . . a more interesting and provocative game."⁴⁴

C. Heavy Rain.

Developed by Paris-based developer Quantic Dream, *Heavy Rain* was released in February 2010 and by August had sold over 1.5 million units. Shortly after its release, the rights for a film adaptation were obtained by New Line Cinema. The game is rated "M" for "mature" by the Entertainment Software Rating Board.

⁴³ *Id.*

⁴⁴ *Id.*

Heavy Rain is halfway between a movie and a game—a genre its developer has called “interactive drama” and others have dubbed a “next-generation adventure game” or a “player-driven movie.”⁴⁵ The player alternates control of four leading characters in a grim, film-noir-style story involving a serial killer known as “The Origami Killer” because of the Origami bird he leaves with his victims. Those characters are Ethan Mars, a father desperately trying to save his son from the killer; Madison Paige, an insomniac who seems unimportant until her character develops; Scott Shelby, a private detective investigating the murders; and Norman Jayden, a drug-addicted FBI agent assigned to track down the killer.

Gameplay is relatively straightforward, requiring the player to press various game controls to make choices on behalf of characters in response to what is taking place onscreen. But notwithstanding the simplicity of play, the *Guardian* wrote that “*Heavy Rain* gets closer than any previous game to conveying the sense that you are controlling the protagonists in an interactive movie”—“its storyline (twist-laden, naturally) is able to suck you in completely.”⁴⁶

⁴⁵ Chris Gaylord, *Heavy Rain Review Roundup*, The Christian Science Monitor, 02/23/10, at <http://www.csmonitor.com/Innovation/Horizons/2010/0223/Heavy-Rain-review-roundup>.

⁴⁶ Steve Boxer, *Heavy Rain*, *Guardian*, 02/18/10, at <http://www.guardian.co.uk/technology/gamesblog/2010/feb/18/heavy-rain-ps3-game-review>.

Indeed, *Heavy Rain* is “a brilliantly engaging example of nonlinear storytelling, one that unfolds all around you as a direct, if often obscured and subtle, result of the choices you make and don’t make.”⁴⁷ The game was “built around a 2,000 page script written by its main creator, David Cage, but as a player you experience only that part of the script that is relevant” given the specific choices you make “over the roughly 10-hour narrative.”⁴⁸ Hundreds of choices—from the entirely quotidian to difficult moral dilemmas—are presented, each introducing new variables into the narrative. The game weaves these variables back into a limited number of potential outcomes—*Heavy Rain* has 17 distinctly different endings—and which ending the player ultimately reaches depends on his choices throughout the game. None of the endings is exactly uplifting but some are better than others: In *Heavy Rain*, there is “no way to lose, per se,” but “depending on your point of view, there may be no way to win, either.”⁴⁹

Certain facts are common to all the endings, including the identity and motivations of the Origami Killer. Those motivations are revealed late in the game, when the player takes on the role of a fifth character: the Origami Killer as a child. As the child, the player relives a scene in which his twin

⁴⁷ Seth Schiesel, *A Murderer’s Young Prey; A Father’s Torment*, N.Y. Times, 02/26/10, at <http://www.nytimes.com/2010/02/27/arts/television/27heavy.html>.

⁴⁸ *Id.*

⁴⁹ *Id.*

brother drowns in a construction yard flooded with stormwater when their drunken father declines to intervene. The child is revealed to be Scott Shelby, the likable private detective whose character the player has assumed for much of the game. Shelby's career as a serial killer has been an effort to test the bounds of fathers' love for their sons—to see what the fathers will do to save their sons that his own father would not. The final scenes of the game focus on whether Ethan, Madison, and Jayden—again, each animated by the player at different times—are able to identify Shelby as the killer and save Ethan's son, whom Shelby has selected as his next victim.

Describing the game from a critical distance, however, does it little justice. Like the movies from which it draws inspiration—films by “masters like Hitchcock, Kubrick and David Lynch”⁵⁰—*Heavy Rain*'s primary appeal is its emotional power. “Were this filmed as a Hollywood picture, it would fit perfectly with the work of someone like Martin Scorsese or David Fincher.”⁵¹ “In its exploration of the psychology of the sociopath,” the *New York Times* writes, “*Heavy Rain* [also] owes more than a bit to novelists like Thomas Harris (‘The Silence of the Lambs’ and ‘Hannibal’).”⁵² The story of the game was inspired by creator David Cage's “fears for his children,” and “the emotional weight of *Heavy Rain* is almost entirely bound up in Ethan's sense of

⁵⁰ *Id.*

⁵¹ Chris Roper, *Heavy Rain Review*, IGN, 02/23/10, at <http://ps3.ign.com/articles/106/1067755p2.html>.

⁵² Schiesel, *supra* note 47.

responsibility for his sons.”⁵³ The artistry of the game contributes to that weight: the “sumptuous score” and “[t]he poetry of the cinematography fully realized, combined with a genuine ability to evoke sadness, fear and guilt, make for one of the most emotionally provocative titles ever.”⁵⁴

As with the other games described here, however, *Heavy Rain*—like the books and movies from which it draws inspiration—is often violent. The ESRB offers its account of that violence:

Players may encounter . . . a woman squirming and screaming as she catches on fire; a man impaled in the chest with a power drill; a female attacked in her own home by masked male assailants (the scene is prolonged); and a man shot (shown in slow-motion) by police officers. Blood sometimes accompanies the acts of violence—whether triggered or viewed passively.

The most intense instance of violence occurs during a “lizard trial” sequence in which players’ character, Ethan, is forced to cut off a segment of his own finger to save his son’s life⁵⁵

Although a similarly detailed description of the violence in many PG-13 movies would garner a good

⁵³ *Id.*

⁵⁴ Will Freeman, *Heavy Rain*, The Observer, 02/21/10, at <http://www.guardian.co.uk/technology/2010/feb/21/heavy-rain-sony-quantic-dream>.

⁵⁵ ESRB, *Heavy Rain*, at <http://www.esrb.org/rates/synopsis.jsp?Certificate=28506>.

deal more controversial content (consider 2008’s revenge thriller *Taken*⁵⁶) there is no denying that *Heavy Rain* is violent at times.

As citizens, our reaction to that violence depends a good deal on what we expect games to be. *Heavy Rain* illustrates that we are increasingly entitled to expect a gaming experience combining some of the best attributes of both literature and film. Indeed, as *The Guardian* concludes, “Quantic Dream’s latest may not only be the best game you’ve ever played—it could even become one of your favorite films.”⁵⁷ And the game should receive no less First Amendment protection as the former than as the latter.

D. BioShock.

BioShock was released by Irrational Games in 2007. It is among the most critically acclaimed games of all time, with a vast array of awards to its credit. The Entertainment Software Rating Board rated the game “M” for “mature” due to its violence. In February 2010, a much anticipated sequel, *BioShock 2*, was released and has sold several million copies to date.

BioShock is a “first-person-shooter” role-playing game—a game in which the player does not see the protagonist he animates, but rather views the virtual world through the protagonist’s eyes. An “intelligent, gorgeous and occasionally frightening” game,⁵⁸

⁵⁶ IMDB, *Parents Guide for Taken*, at <http://www.imdb.com/title/tt0936501/parentalguide>.

⁵⁷ Freeman, *supra* note 54.

⁵⁸ Seth Schiesel, *Genetics Gone Haywire and Predatory Children in an Undersea Metropolis*, N.Y. Times, 09/08/07, at

BioShock tells the story of the dying undersea city of Rapture. In brief, Rapture was built in the 1940s by a man named Andrew Ryan as “a libertarian haven for the world’s best and brightest.”⁵⁹ Ryan wanted to create a *laissez-faire* state to escape increasingly oppressive political, economic, and religious authority on land. He constructed Rapture under the ocean, and for some time scientific progress in his city far outpaced that of the terrestrial world. Advancements in biotechnology, in particular, led to the creation of the “plasmid” industry, which offered superhuman physical enhancements to its customers. Scientists discovered that they could produce raw material (“ADAM”) for plasmid in the stomachs of young girls (“Little Sisters,” in the game’s terminology), a process that turned the girls into brainwashed “blood-sucking ghouls” that “wander around Rapture harvesting special genetic material from corpses.”⁶⁰

The game’s primary “dramatic tension” turns on how to interact with these Little Sisters,⁶¹ which are portrayed as fantastic ghost-like characters. The game’s main character, Jack (animated by the player), is told by one of the game’s important non-player characters that the only way he can survive in Rapture is by killing Little Sisters to extract their ADAM, but he is told by another non-player character that he must save the Little Sisters

<http://www.nytimes.com/2007/09/08/arts/television/08shoc.html>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

instead. That choice is left to the player. If he saves a Little Sister, he receives a small amount of additional “power” to survive; if he kills one, he takes all of her powerful elixir.

Significantly, however, over the course of the game the player (as Jack) comes to the realization that he has had *no* choice as to most of what he has done in his life—he has essentially been a slave to one of the game’s primary antagonists. The one choice Jack retains, however—to kill or save the Little Sisters—turns out to determine how the game ends.

Although it has been very successful as a game, *BioShock* is also a self-conscious effort by its creators to engage with fundamental philosophical issues. At the heart of the game is Ayn Rand’s philosophy of “objectivism,” which essentially holds that the proper moral purpose of one’s life is the pursuit of one’s own rational self-interest. But the game’s precise relation to that philosophy is debated—widely debated, in fact, as *BioShock* has generated oceans of critical and academic commentary. The game’s primary writer, Ken Levine, calls the game “a cautionary tale about wholesale, unquestioning belief in something,” and the dangers of “buy[ing] anything”—including Rand’s philosophy—“hook, line and sinker.”⁶² The game, then, provides more questions than answers, requiring players to form their own opinions.

This fact has not been lost on *BioShock*’s reviewers in the mainstream press. The *Chicago*

⁶² Brian Crecente, *No Gods or Kings: Objectivism in BioShock*, Kotaku, 02/15/08, at <http://kotaku.com/354717/no-gods-or-kings-objectivism-in-BioShock>.

Sun-Times reviewer wrote: “I never once thought anyone would be able to create an engaging and entertaining video game around the fiction and philosophy of Ayn Rand, but that is essentially what 2K Games has done. It elicits its share of jump-out-of-your-seat moments with a storyline that is both disturbing and thought-provoking.”⁶³ And the *New York Times* added that the game is “psychologically engaging experience built around a provocative, intellectually mature story.”⁶⁴

As noted above, however, *BioShock* received an “M” rating from the ESRB, which uncharacteristically offered no detailed description of the violence but noted that the game contains “intense violence” and “blood and gore.”⁶⁵ That is true, but then so does Tolkien’s *Lord of the Rings* and the movies it inspired. As one fifteen-year-old *BioShock* player interviewed by the the *New York Times* stated, however, the game is not gratuitously violent, but rather “present[s] you with this moral dilemma, and it’s really up to you what you do with these little girls. . . [T]hat’s what a game should be

⁶³ Misha Davenport, *Game of the Week*, Chicago Sun Times, 08/24/07 at NC33.

⁶⁴ See Seth Schiesel, *BioShock Triumphs at TV Video Game Awards*, N.Y. Times, 12/18/07, at <http://www.nytimes.com/2007/12/18/arts/television/18game.html>.

⁶⁵ ESRB, *Game Ratings*, at <http://www.esrb.org/ratings/search.jsp?titleOrPublisher=bioshock&rating=&ratingsCriteria=&platforms=&platformsCriteria=&searchVersion=compact&content=&searchType=title&contentCriteria=&newSearch.x=0&newSearch.y=0>.

all about: making choices.”⁶⁶ That is also what the First Amendment is about: allowing individuals to encounter speech that some might find distasteful and make their own choices.

III. THE ACT WOULD IMPERMISSIBLY CHILL PROTECTED EXPRESSION.

For all the reasons described above, videogames are a culturally important means of expression protected by the First Amendment. Unfortunately, however, the statute at issue in this case would chill that protected expression. The Act is so vague as to make it impossible for the producers and vendors of videogames to determine which games are subject to the Act. As a result, videogame designers will likely self-censor in order to prevent their products from falling under the statute. The Act’s tendency to chill speech is exacerbated by a second issue: the Act imposes strict liability for all violations. As a result, the Act threatens to subject importers, distributors, and retailers to multi-million dollar fines for entirely innocent miscalculations about whether a game will be deemed “violent” under the Act. For these reasons, the Act violates the First Amendment.

A. The Act Will Chill Expression Because It Is Vague.

Despite many opportunities to clarify which games it believes are covered by the Act and to explain how it would reach that conclusion, the State of California has made a point to identify only a single example of a game it deems violent. This point

⁶⁶ See Schiesel, *supra* note 58.

was not lost on the district judge, who characterized the State as “reluctan[t] to attempt to apply the Act’s definition of ‘violent video game’” to real-world examples.⁶⁷ The reason for California’s reluctance is obvious: determining what games qualify as “violent” under the statute is a difficult, entirely subjective enterprise. The Act restricts the sale of games “in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that” meets a three-pronged test.⁶⁸ The three-pronged test is so vague, however, that it is nearly impossible to determine whether many games meet *any* of the three characteristics—much less all three.

The first prong asks whether a “reasonable person, considering the game as a whole, would find [*sic*] appeals to a deviant or morbid interest of minors.”⁶⁹ But the Act does not define “deviant” or “morbid” interest or explain how to determine whether a particular depiction of violence appeals to such an interest. The lack of a definition is no academic matter.⁷⁰ As game developer Ted Price explained in his affidavit before the district court, “there is no common or accepted understanding of this term, and game creators and others will not be

⁶⁷ *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1041 (N.D. Cal. 2005).

⁶⁸ Cal. Civ. Code § 1746(d)(1).

⁶⁹ *Id.* § 1746(d)(1)(A)(i).

⁷⁰ *Entm’t Software Ass’n v. Granholm*, 426 F. Supp. 2d 646, 655-56 (E.D. Mich. 2006); *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 835 (M.D. La. 2006).

able to know at what point an interest becomes ‘morbid’ or ‘deviant’. . . . [Moreover,] each individual is unique in his or her level of interest in any topic.”⁷¹ In theory, however, any game that allows a player to commit an act disapproved by some segment of the population could be considered “deviant.” And nearly any depiction of death could be construed as morbid.

The second prong asks whether the game is “patently offensive to prevailing standards in the community as to what is suitable for minors.”⁷² But there likely is no such prevailing standard for what level of violence is appropriate for minors as an entire class—particularly without taking into account specific characteristics of the child.

The Act’s third prong asks whether the game depicts violence in a way that “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.”⁷³ The first part of the standard is familiar from the law of obscenity. But the phrase “for minors” makes the standard vaguer because it is simply impossible to know whether a work lacks value for minors as an entire class. The answer would depend on the age, background, and maturity of the child—factors that the Act completely ignores. Depictions of violence from

⁷¹ Declaration of Ted C. Price (Docket No. 8) at 9-10 ¶¶18-22, *Video Software Dealers Ass’n v. Schwarzenegger*, No. 05-4188 (N.D. Cal. 2005) (“Price Declaration”).

⁷² Cal. Civ. Code § 1746(d)(1)(A)(ii).

⁷³ *Id.* § 1746(d)(1)(A)(iii).

literary works may have no value for a four-year-old but have great meaning for a teenager.

The Act's inherent vagueness raises a serious First Amendment problem. As Mr. Price explained in the district court, a game that is labeled "violent" is likely to suffer a serious stigma that will reduce sales and make retailers less likely to carry the game.⁷⁴ And because there is "no predictable or settled" way to determine which games will be deemed "violent" under the Act, videogame authors, producers, distributors, and retailers are likely to err on the side of caution.⁷⁵ The result will be self-censorship in which "our designers will have to restrict the kinds of storylines and gameplay we include in our games."⁷⁶

The burdens imposed by the Act would affect all levels of the game-development process, from start to finish. At the beginning of that process, game designers brainstorm the basic concepts that will be included in the game. During the "concept" phase, developers must vet ideas carefully because game development costs often exceed \$25 million, and a single failed game can doom a development company. Games deemed "violent" would be at increased risk of failure, so developers will likely choose to avoid any concepts that may run afoul of the Act.

This self-censorship would continue at later stages of development. During these stages, artists translate the initial concept into concrete

⁷⁴ Price Declaration, *supra* note 71 at 10 ¶22.

⁷⁵ *Id.* at 9 ¶18.

⁷⁶ *Id.* at 10 ¶21.

representations on the screen. These representations typically reflect the artists' own personalities and look different than the concept that was initially adopted. While this evolution is a crucial element of the creative process, it generates a constant risk that ideas that seemed "safe" at the concept stage could evolve into something that would trigger the Act. Thus, developers will continually have to reevaluate how subtle changes would affect the game's compliance with the Act.

This Court has previously recognized that vague restrictions on speech impose just this sort of burden of self-censorship. For example, in *Reno v. ACLU*,⁷⁷ the court noted that vagueness was "a matter of special concern" because the statute at issue was "a content-based regulation of speech." It concluded that the severity of the sanctions for a violation "may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." And although the penalties in the *Reno* case were *criminal*, the fines at issue here are nearly as onerous. The Act authorizes a fine of \$1,000 for each violation,⁷⁸ which—for a company importing thousands of copies of a single game—could mean a fine of millions of dollars.

B. The Act Will Chill Speech Because It Lacks a Scierter Requirement.

The difficulty in determining exactly what the Act covers is exacerbated by a second problem—the lack of a scierter requirement. The Act mandates strict

⁷⁷ 521 U.S. 844, 871 (1997).

⁷⁸ Cal. Civ. Code § 1746.3.

liability for the sale of a violent videogame to a minor, imposing liability even for innocent misunderstandings of the vague statutory terms. Similarly, although the Act requires warning labels on violent videogames that are “imported” or “distributed” for retail sale, it fails to specify what level of intent an importer or distributor must have to be found liable.

This Court has previously held that because of the chilling problem, the First Amendment prohibits the state from imposing criminal penalties on speech if those penalties are applied without proof that the speaker knew his conduct was prohibited.⁷⁹ This prohibition is not limited to criminal penalties like the one in *Smith*.⁸⁰ This Court has imposed scienter requirements even on civil laws that impose draconian sanctions on speech—for example libel statutes.⁸¹ The Court explained, “The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.”⁸² So too here. The fear of multi-million-dollar damage awards will chill the speech of videogame producers, distributors, and retailers.

⁷⁹ See *Smith v. Cal.*, 361 U.S. 147, 152 (1959).

⁸⁰ See *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992).

⁸¹ E.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (holding that “What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel”).

⁸² *Id.* at 277.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,
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